Supreme Court, U.S.
FILED
SEP 19 1994
OFFICE OF THE CLERK

No. 94-115

In the Supreme Court of the United States

OCTOBER TERM, 1994

RUSSELL HAMPSHIRE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the district court erred in sentencing petitioner to a term of supervised release and imposing a fine to cover the cost of his imprisonment and supervised release.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Braxton v. *United States*, 500 U.S. 344 (1991)	9
Markus v. *United States*, 545 F. Supp. 998 (S.D.N.Y. 1982), aff'd, 742 F.2d 1444 (2d Cir. 1983)	8
United States v. *Corral*, 964 F.2d 83 (1st Cir. 1992)	9
United States v. *Doyan*, 909 F.2d 412 (10th Cir. 1990)	10
United States v. *Fair*, 979 F.2d 1037 (5th Cir. 1992)	9
United States v. *Favorito*, 5 F.3d 1338 (9th Cir. 1993), cert. denied, 114 S. Ct. 1374 (1994)	9
United States v. *Guglielmi*, 615 F. Supp. 1506 (W.D.N.C. 1985), aff'd, 819 F.2d 451 (4th Cir. 1987), cert. denied, 484 U.S. 1019 (1988)	8
United States v. *Hagmann*, 950 F.2d 175 (5th Cir. 1991), cert. denied, 113 S. Ct. 108 (1992)	10
United States v. *Johnson*, 952 F.2d 565 (1st Cir. 1991), cert. denied, 113 S. Ct. 58 (1992)	6
United States v. *Labat*, 915 F.2d 603 (10th Cir. 1990)	9
United States v. *Norman*, 3 F.3d 368 (11th Cir. 1993), cert. denied, 114 S. Ct. 1102 (1994)	9
United States v. *Spiropoulos*, 976 F.2d 155 (3d Cir. 1992)	9
United States v. *Turner*, 998 F.2d 534 (7th Cir.), cert. denied, 114 S. Ct. 639 (1993)	9
United States v. *Villegas*, 911 F.2d 623 (11th Cir. 1990), cert. denied, 499 U.S. 977 (1991)	6

Statute and rules: Page

18 U.S.C. 1462 2
Sentencing Guidelines:
§ 5E1.2(i) 4, 5, 9, 10
§ 5K1.1 2
Fed. R. Crim. P. 11(e)(1)(c) 7

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-115

RUSSELL HAMPSHIRE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is unpublished, but the decision is noted at 15 F.3d 1096 (Table).

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1994. A petition for rehearing was denied on April 6, 1994. Pet. App. B1-B2. The petition for a writ of certiorari was filed on July 6, 1994, and is therefore out of time pursuant to Rule 13.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a guilty plea in the United States District Court for the Southern District of Alabama, petitioner was convicted on two counts of causing the interstate transportation of obscene material by common carrier, in violation of 18 U.S.C. 1462. He was sentenced to 12 months' imprisonment, to be followed by a three-year term of supervised release. In addition, he was ordered to pay the cost of his incarceration and supervised release. The court of appeals affirmed. Pet. App. A2.

1. Petitioner was the president and sole stockholder of co-defendant VCA Labs, Inc. From mid-1989 to early 1990, VCA shipped at least 18 sexually explicit video cassettes from California to the Southern District of Alabama. Petitioner and VCA were indicted on three counts of causing the interstate transportation of sexually explicit material by common carrier and one count of conspiring to commit that offense. The indictment also sought the forfeiture of certain assets as proceeds of the above offenses.

The parties thereafter entered into a written plea agreement. The agreement stated that petitioner would plead guilty to two of the substantive counts in the indictment and would provide the government with information about the adult obscenity industry. Plea Agreement ¶¶ 1, 5. In return, the government undertook to dismiss the remaining counts, not to prosecute petitioner for certain uncharged offenses, and to recommend a downward departure to a term of 12 months' imprisonment, pursuant to Sentencing Guidelines § 5K1.1, if petitioner provided the cooperation contemplated by the agreement. Plea Agreement ¶¶ 3-4, 12. The agreement stated that petitioner understood

that he was subject to a maximum penalty of five years' imprisonment and a fine of $250,000 on each count to which he pleaded guilty. *Id.* ¶ 1.

Under the plea agreement, co-defendant VCA agreed to plead guilty to all the counts of the indictment and to "pay forfeiture in the amount of $2 million." Plea Agreement ¶ 7. VCA also agreed to plead guilty to obscenity offenses in two other federal district courts. The agreement stated that "it is the intent for the cumulative forfeiture amount [in all districts] to be two million dollars with no fine" and that "[a]s part of those pleas the Government agrees not to request any fine." *Id.* ¶ 10. The agreement added that "[t]his agreement shall be null and void if the agreed terms are not adopted by all the district courts and the parties will be permitted to withdraw all pleas previously entered." *Ibid.*[1]

---

[1] Paragraph 10 of the Plea Agreement provided in full:

> VCA Labs, Inc., further agrees to enter corporate pleas of guilty to transportation of obscene materials in violation of Title 18 U.S.C. §1462 in the Northern District of Oklahoma and a second district whose identity will be revealed upon acceptance of the instant plea. As part of those pleas the Government agrees not to request any fine. Further, the United States Attorney for the unnamed district agrees to request forfeiture in an amount not to exceed $500,000.00 which shall be taken from the $2 million dollars forfeited to the United States Attorney for the Southern District of Alabama pursuant to the instant plea.
>
> The pleas in these two districts will be accomplished by Rule 20 if possible but if pleas are required before district judges in the respective districts, the parties agree that it is the intent for the cumulative forfeiture amount to be two million dollars with no fine. This agreement shall be null and void if the agreed terms are not adopted by all the district courts and the parties will be permitted to withdraw all pleas previously entered.

2. The presentence report stated that the applicable penalties for petitioner's offenses under the Sentencing Guidelines were a prison term of 27 to 33 months, a supervised release term of not more than three years, and a fine of between $5,000 and $50,000. Presentence Report ¶¶ 33-35, 60. The report added that "[s]ubject to the defendant's ability to pay, the Court shall impose an additional amount that is at least sufficient to pay the cost to the Government of any imprisonment, probation or supervised release ordered. [Guidelines] § 5E1.2(i)."[2] *Id.* ¶ 61. The report concluded that, based on petitioner's reported net worth of over $400,000 and monthly net income of approximately $6,000 derived from his pornography business, he was able to pay a cost-of-imprisonment fine. *Id.* ¶¶ 64-65.

3. Prior to the imposition of sentence, the prosecution informed the district court *in camera* that it would recommend that petitioner receive a downward departure to 12 months' imprisonment for his substantial assistance to the government. 9/11/92 Tr. 3. When the defense informed the court that it would be seeking an additional downward departure, the court indicated that it was not inclined to depart further. Although the court agreed to follow the plea agreement, it expressed disappointment with the government for settling the case on what it regarded as excessively lenient terms.

---

[2] Sentencing Guidelines § 5E1.2(i) provides that "[n]otwithstanding the provisions of subsection (c) of this section, but subject to the provisions of subsection (f) herein, the court shall impose an additional fine amount that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release ordered." Subsection (c) of the Guideline consists of the Fine Table for calculating the applicable amount of a "punitive" fine. Subsection (f) makes the imposition of any fine contingent on the defendant's ability to pay.

Id. at 4. The court stated that it had recently sentenced a defendant to ten years' imprisonment "for being the girlfriend of someone who distributed cocaine," and that, in its view, "the production of obscene material is as bad as the production of cocaine." *Id.* at 5. The court added that it had "a very bad attitude toward [obscene material]." *Ibid.* The court informed the parties that it had sent a letter to the Attorney General expressing regret at having followed the government's sentencing recommendation and stating that it would never approve such a settlement again. *Id.* at 6.

At sentencing, the district court accepted the government's recommendation for a downward departure to 12 months' imprisonment, and imposed a three-year term of supervised release. The court also fined petitioner $22,054.80 pursuant to Guidelines § 5E1.2(i) to cover the cost of his imprisonment and supervised release. C.A. E.R., Tab 4, at 2-3. When the court informed the defense counsel following the imposition of sentence that, if he had any objections to the sentence, he "should articulate those grounds at this time or they will be waived on appeal," counsel objected only to the court's failure to depart below 12 months. 9/11/92 Tr. 46.

4. On appeal, petitioner contended that the district court erred in imposing a term of supervised release and a fine to cover the cost of his incarceration. In a brief *per curiam* opinion, the court of appeals held that petitioner had waived his claims. The court explained: "Although the district court gave [petitioner] ample opportunity to object as required by the law of this circuit, [petitioner] raised none of the challenges he now seeks to raise for the first time on appeal." The court did not address petitioner's claims on the merits. Pet. App. A2.

ARGUMENT

Petitioner contends that the district court erred in sentencing him to a term of supervised release and in imposing a fine to cover the cost of his imprisonment and supervised release. Specifically, he argues that imposition of the supervised-release term and the fine was inconsistent with his plea agreement; that the district court lacked jurisdiction to impose a cost-of-incarceration fine without first imposing a "punitive" fine; and that the imposition of a fine to cover the cost of incarceration is unconstitutional.

1. As the court of appeals held, petitioner waived his challenges to his sentence by failing to raise them at sentencing. After imposing sentence, the district court specifically invited petitioner to raise any objections to his sentence. Petitioner's only complaint was directed to the court's refusal to depart downward below 12 months; he said nothing about the term of supervised release or the fine. It is well settled that the failure to raise a challenge to a sentence in the district court waives the claim. See, *e.g.*, *United States* v. *Johnson*, 952 F.2d 565, 585 (1st Cir. 1991), cert. denied, 113 S. Ct. 58 (1992); *United States* v. *Villegas*, 911 F.2d 623, 632 (11th Cir. 1990), cert. denied, 499 U.S. 977 (1991).

With respect to most of his claims, petitioner offers no basis to conclude that they were preserved in the face of his clear waiver at the sentencing hearing. As to his claim that the plea agreement precluded imposition of a fine, however, petitioner argues that he preserved that claim in his Memorandum of Points and Authorities with respect to Sentencing Factors (Def.'s Sentencing Mem.), which he filed with the district court prior to sentencing. He relies on a single sentence in that document, which stated: "With respect to the Plea

Agreement, it is understood that this plea was entered pursuant to Federal Rule of Criminal Procedure 11(e)(1)(c) and that there is to be no fine for the defendant only a cumulative fine of $2,000,000 for the corporation, VCA Labs, Inc." Def.'s Sentencing Mem. 7. Absent any suggestion at the sentencing proceeding itself that petitioner took issue with the imposition of the fine, the court of appeals properly declined to regard that statement as an objection sufficient to preserve his challenge to the fine.

2. In any event, petitioner's various claims do not warrant further review.

a. Petitioner argues (Pet. 4, 15) that the plea agreement precluded imposition of a fine. The plea agreement specifically provided that the maximum penalty to which petitioner was subject included "a fine of $250,000." Plea Agreement ¶ 1. The district court properly construed that language to permit at least a $22,000 cost-of-imprisonment fine.

Contrary to petitioner's contention, the district court's construction of the plea agreement is consistent with paragraph 10 of the Plea Agreement. Paragraph 10 of the Plea Agreement provided that "the parties agree that it is the intent for the cumulative forfeiture amount [in all district courts] to be two million dollars *with no fine*" (emphasis added). See note 1, *supra*. But paragraph 10 was concerned solely with the disposition of the charges against co-defendant VCA Labs—not the charges against petitioner—and the consequences of VCA's guilty pleas in other districts. Paragraph 10 began with a statement that VCA "further agrees to enter corporate pleas of guilty" in various districts, and that "[a]s part of those pleas the Government agrees not to request any fine." Nothing in paragraph 10 addressed the sentence to be imposed on petitioner. In any event,

further review to determine whether the district court properly construed the particular terms of the plea agreement in this case would be unwarranted.

b. Petitioner also appears to argue that the court of appeals should not have found a waiver because the district court's imposition of the fine and term of supervised release was the product of bias. Any bias on the district court's part in imposing sentence, however, has no logical bearing on the question whether the court of appeals correctly determined that petitioner waived the present challenges to his sentence. In addition, petitioner waived his claim of judicial bias by failing to raise it in the district court.

In any event, there are no grounds for concluding that the district court was biased. In support of the allegation, petitioner relies on statements by the court at the *in camera* hearing revealing the court's belief that obscenity offenders should be sentenced harshly, and on the letter the court sent to the Attorney General. Different judges, however, bring different sentencing philosophies to bear on the sentencing decision. The fact that some judges would impose harsher sentences for certain offenses than would other judges, within the limits prescribed by the pertinent statutes and Guidelines, does not establish bias. See, *e.g.*, *United States* v. *Guglielmi*, 615 F. Supp. 1506, 1511 (W.D.N.C. 1985), aff'd, 819 F.2d 451 (4th Cir. 1987), cert. denied, 484 U.S. 1019 (1988); *Markus* v. *United States*, 545 F. Supp. 998, 1000 (S.D.N.Y. 1982), aff'd, 742 F.2d 1444 (2d Cir. 1983) (Table). Nor did the court's letter to the Attorney General questioning the wisdom of the plea agreement suggest that the court was biased. The court in fact approved the agreement and determined to comply with it in imposing sentence. The fact that the court developed

strong views concerning the wisdom of the agreement does not suggest bias.

c. As petitioner suggests, there is a conflict among the circuits on the question whether the Sentencing Guidelines authorize a cost-of-incarceration fine without a separate "punitive" fine. Compare *United States* v. *Favorito*, 5 F.3d 1338, 1340 (9th Cir. 1993), cert. denied, 114 S. Ct. 1374 (1994), and *United States* v. *Turner*, 998 F.2d 534 (7th Cir.), cert. denied, 114 S. Ct. 639 (1993) (no punitive fine required as prerequisite for cost-of-incarceration fine) with *United States* v. *Norman*, 3 F.3d 368 (11th Cir. 1993), cert. denied, 114 S. Ct. 1102 (1994); *United States* v. *Fair*, 979 F.2d 1037 (5th Cir. 1992); *United States* v. *Corral*, 964 F.2d 83 (1st Cir. 1992); and *United States* v. *Labat*, 915 F.2d 603, 607 (10th Cir. 1990) ("punitive" fine is required). The conflict, however, centers on the interpretation of Sentencing Guidelines § 5E1.2(i), and therefore can be resolved by the Sentencing Commission. See *Braxton* v. *United States*, 500 U.S. 344, 348-349 (1991). In any event, the issue has little practical significance, for even if a separate punitive fine were required, the district court had authority to impose a punitive fine of $1 and then a cost-of-incarceration fine in the same amount as the one it actually imposed. See *Turner*, 998 F.2d at 538.

d. Petitioner also states (Pet. 16) that the Guidelines provision governing cost-of-incarceration fines is unconstitutional. In *United States* v. *Spiropoulos*, 976 F.2d 155 (3d Cir. 1992), the case cited by petitioner for that proposition, the court did not base its decision on constitutional grounds. Instead, the court held that the Guidelines provision authorizing a cost-of-imprisonment fine was invalid because the Sentencing Reform Act, pursuant to which it was promulgated, does not authorize the assessment of a fine to pay the cost of a

defendant's imprisonment. 976 F.2d at 165. Petitioner does not raise that statutory issue in his petition, and other courts have rejected constitutional challenges to Section 5E1.2(i). *United States* v. *Hagmann*, 950 F.2d 175, 186-187 (5th Cir. 1991), cert. denied, 113 S. Ct. 108 (1992); *United States* v. *Doyan*, 909 F.2d 412 (10th Cir. 1990).

e. Finally, there is no merit to petitioner's claim that the imposition of a term of supervised release violated the plea agreement. Although the plea agreement did not specifically address the question whether a term of supervised release would be included in petitioner's sentence, it stated that petitioner was subject to a maximum sentence of five years. The one-year prison term and three-year term of supervised release petitioner received were cumulatively well within that range.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

SEPTEMBER 1994